

ASSISTANT EXECUTIVE OFFICER'S
SUMMARY REPORT
9:00 a.m., April 24 and 25, 2006
Veterans Memorial Building
10th and H Streets, Eureka

ITEM: 1

SUBJECT: Watershed-wide Waste Discharge Requirements for Timber Harvesting Plan Activities Conducted by Scotia Pacific Company, Salmon Creek Corporation, and the Pacific Lumber Company in the Elk River and Freshwater Creek watersheds: Orders R1-2006-0038 and R1-2006-0039 (Elk River), and Orders R1-2006-0040 and R1-2006-0041 (Freshwater Creek).

This report is supplemental to previous staff reports released on June 29, 2005, September 2, 2005, and March 8, 2006, regarding the proposed watershed-wide Waste Discharge Requirements (WWDRs) for certain lands in the Elk River and Freshwater Creek watersheds. Specifically, the proposed WWDRs apply to lands owned and operated by the Pacific Lumber Company (Palco), the Scotia Pacific Company LLC, and Salmon Creek Corporation, all subsidiaries of MAXXAM, Inc., (hereinafter collectively referred to as the Discharger) in the Elk River and Freshwater Creek watersheds.

A brief chronology of the events leading up to this hearing appears below:

June 29, 2005	Release of WWDRs, CEQA documentation, technical reports for public review and comment
August 8, 2005	End of first public comment period
September 2, 2005	Release of agenda package for Regional Water Board hearings on September 14 and 15, 2005
September 13, 2005	Humboldt County Superior Court Temporary Restraining Order (TRO)
September 14, 2005	Short Regional Water Board meeting informing public of the TRO and taking testimony on procedural matters only
December 5, 2005	TRO dissolved
February 17, 2006	Status Conference on the Regional Water Board process for re-initiating the review and consideration of WWDRs
March 10, 2006	Release of March 8, 2006 public review package containing proposed WWDRs, CEQA documentation, technical reports, previous Responses to Comments, and late comments received
March 24, 2006	End of second public comment period
April 14, 2006	Release of agenda package for Regional Water Board hearings on April 24 and 25, 2006

BACKGROUND

The basis of the proposed action is the sum total of a long and extensive record documenting ongoing cumulative watershed effects in the Elk River and Freshwater Creek watersheds, and of Regional Water Board motions to develop WWDRs to reduce these cumulative watershed effects.

The Discharger owns land and/or conducts timber harvesting, forestry management, road construction and maintenance, and related activities on approximately 21,000 acres (76%) of the 27,500-acre Elk River watershed, and 15,520 acres (77%) of the 19,892-acre Freshwater Creek watershed, both tributaries to Humboldt Bay, California.

The Discharger has conducted accelerated timber harvesting activities across its lands in Elk River and Freshwater Creek since 1986, making entries for harvest on approximately 80% of its ownership in each watershed in the last 20 years. Sediment deliveries to Elk River and Freshwater Creek increased in response to these accelerated timber harvesting plan activities. The resulting impacts to water quality conditions documented by watershed residents, Regional Water Board staff, and other agency staff, many of which persist today, include nuisance flooding, reductions in habitat for anadromous fish species, interference with and destruction of surface water supplies.

Representatives of California Department of Forestry and Fire Protection, California Department of Fish and Game, California Geological Survey (formerly the California Division of Mines and Geology), and the Regional Water Board reached consensus on December 16, 1997, that Elk River and Freshwater Creek had endured significant adverse cumulative watershed impacts, with timber harvesting a contributing factor.

While the Discharger contends that watershed conditions have improved in recent years, instream conditions have not changed substantially, according to monitoring data available to Regional Water Board staff. The data indicates that conditions at the majority of monitored sites have not changed, and of the remainder, some have improved, and others have worsened. Also, most of the monitoring sites in Elk River and Freshwater Creek do not meet the target conditions for 3-out-of-4 of the measured sediment parameters, and affected residents continue to suffer from increased frequency and magnitude of flooding.

An independent scientific review panel (ISRP) commissioned by the Regional Water Board issued two reports, which were broadly circulated and discussed at numerous public Regional Water Board meetings and workshops. The ISRP found the Habitat Conservation Plan, Sustained Yield Plan, and Timber Harvesting Plan review processes to be well intentioned and important, but insufficient to meet all Basin Plan water quality objectives. The reports provided useful recommendations on the use of empirical (observation-based) models to reduce sediment and peak flows by decreasing the amount of land disturbance. The models used to develop receiving water limitations in the WWDRs follow those recommendations.

The Regional Water Board passed a series of motions on December 3, 2003, finding that additional regulatory actions were "necessary to address the water quality impacts due to the rate and scale of land disturbing activities in the five watersheds." Among the Regional Water Board's specific instructions was a motion directing staff to issue requests for Reports of Waste

Discharge (ROWDs), leading to WWDRs for sediment generating activities in the Elk River and Freshwater Creek watersheds.

The Executive Officer issued an order with specified information requirements on June 17, 2004, requiring the Discharger to submit ROWDs for its activities in the Elk River and Freshwater Creek watersheds. This order followed months of discussion with Palco representatives, including a discussion of the types of information that would be necessary to draft the WWDRs. The ROWDs were both late (submitted two and a half months after the July 16, 2004 deadline) and incomplete. Discussions and meetings to resolve the deficiencies in that initial submittal ensued, and the ROWDs were finally deemed complete on January 25, 2005, with the understanding that our ongoing analysis of the data might reveal further shortcomings. As Regional Water Board technical staff delved into the data and developed the WWDRs, they did find additional problems with the data, which were not fully resolved until June of 2005.

Due to the Discharger's allegations that the Executive Officer and Regional Board members were under undue influence of their staff (i.e., the WWDRs development team), and due to the inherent controversy associated with the WWDRs, the Regional Water Board decided to separate the Board advisory and permit preparation functions on July 12, 2005. Under this process of separated functions, the 'Issuance Team' has prepared the WWDRs and is presenting them to the Regional Water Board for its consideration. The 'Advisory Team' assists the Board in managing the hearings and evaluating the WWDRs by providing technical and legal advice to the Board.

As detailed above, draft WWDRs were released for public review in June of 2005 and hearings were scheduled for September of 2005. The process was halted prior to those hearings by a TRO obtained by a group of Elk River landowners and the Discharger. The TRO was lifted on December 5, 2005. Then the process began again, for the Board to consider the draft WWDRs that address the primary issues of nuisance flooding and sediment discharges from land disturbing activities by the Discharger in the Elk River and Freshwater Creek watersheds.

RESPONSES TO COMMENTS

Public comments were received on two releases of the proposed WWDRs during two separate comment periods: 1) June 29 to August 8, 2005, and 2) March 8 to March 24, 2006. Responses to comments for the first review period were distributed in a package dated September 2, 2005, along with corresponding revisions to the proposed WWDRs. That release comprised the agenda package for Regional Water Board hearings on September 14 and 15, 2005 that were subsequently cancelled due to the TRO.

On March 8, 2006, the September 2, 2005 package was re-released along with a supplemental staff report for the second public comment period preparatory to Regional Water Board hearings scheduled for April 24-25 and May 8, 2006. 'Late comments' received after the deadline for the first public comment period (June 29 to August 8, 2005) were included in the March 8th package, to be addressed during the second comment period (which ended March 24, 2006) per instructions from the Regional Water Board Chair via the Advisory Team. Included in those 'late comments' were the Discharger's proposed Alternative WWDRs.

The April 14, 2006 Response to Comments prepared for the April 24-25, 2006 hearings contains the comments and responses as released on September 2, 2005 as well as 'supplemental'

responses to comments received during the second review period. In order to keep all Responses to Comments together in a single package, the second round of comments and responses appears as a separate section behind the September 2, 2005 comments and responses. Any supplemental comments that were simply restatements of previously submitted comments are not repeated, since they were already addressed in the September 2, 2005 document. Substantive new comments that are different or are in addition to previously received comments are addressed in the supplemental responses. Substantive new comments were received on the following topics: Economics, Landslide Reduction Model, Peak Flow Model, Legal and Procedural Issues, Analysis of Monitoring Data, Palco's Proposed Alternative WWDRs, and Miscellaneous Subjects.

SPECIFIC ADVISORY TEAM ITEMS

A number of items were specifically raised by the Advisory Team in its *Second Interim Order After Status Conference* dated March 1, 2006. The Discharger provided comments on the Issuance Team's responses to those items in the March 8, 2006 package. Where appropriate, responses to the Discharger's comments are contained in the supplemental Response to Comments document. However, given the central role of these issues in the lawsuit that interrupted these proceedings, it seems important to highlight them here for ease of review:

Consideration of economic effects

The Issuance Team prepared a lengthy analysis of economic considerations, based on available information, and that analysis is included in the September 2, 2005 Response to Comments in sections 5A and 5B, under the heading: "Economic Considerations Associated with the Regulation of Palco's Timber-Harvest Related Discharges in Elk River and Freshwater Creek Watersheds." Despite a refusal by the Discharger to provide documents substantiating its repeated claims of economic harm over the last several years, Issuance Team staff's September 2, 2005 memorandum contains a great deal of information obtained from other sources (e.g., the Securities and Exchange Commission).

For the reasons detailed in the September 2, 2005 memorandum, at the most basic level, the proposed WWDRs can be expected to have both positive and negative economic effects. There is inadequate information available to accurately quantify either, but it is reasonably foreseeable that the company will suffer a deferral of some quantity of revenues as the result of a temporary reduction in the rate of harvest in this portion of the company's holdings, and a correlated deferral of profits. By the company's own testimony, it makes an average net profit of about \$1.25 million for every THP it cuts. For reasons detailed in the September 2, 2005 memo, the vast bulk of those profits go to maintaining debt the company has chosen to incur on the Scotia Pacific subsidiary, in part to retire debt in other MAXXAM subsidiaries and to distribute to shareholders. The Palco/ScoPac/ MGI/ MAXXAM financial picture is far too complex to summarize here, but it is important, and surprisingly interesting reading, and staff recommends that the Board review the details provided in the September memo.

As also explored more below, claims regarding potential layoffs, tax revenues, or other "downstream" economic impacts on the timber harvest-dependent economy, appear to be attributable to conscious decisions the Discharger has made over the years. These include: how it has chosen to manage its revenues and distribute profits; the amount of debt the company has chosen to incur and re-incur on the Scotia Pacific subsidiary; and the decision to frontload the

liquidation of standing timber assets at a rate that was expressly designed to be high in the early years, dropping off over time as the standing timber assets were depleted, with a corresponding, planned drop-off in revenues and employment.

In 1987, Palco management believed that the company could sustain an increase in its rate of harvest for about 20 years. At the end of that period, the inventory of old growth redwood would have been substantially depleted and a reduction in the rate of harvest would be necessary. This reflects a consciously chosen “boom and bust” business strategy, and no matter what the Regional Water Board does or does not do, we are approaching the “bust” end of that cycle. A permit limit that has the effect of slowing down the cut may cause that bust cycle to play out a little earlier, but also perhaps a little more slowly than predicted, in effect dampening the curve on the already planned ramping down of logging in these watersheds. In summary, it is reasonable to expect that some revenues will be deferred, and some already planned layoffs may happen a few months or possibly a couple of years sooner than planned, but other layoffs may happen later than planned, as a result of this deferred cut.

On the other side of the scale, there is also inadequate information to accurately quantify the positive economic effects of the WDRs, mainly because these positive effects are spread across various uses of, and impacts to, Elk River and Freshwater Creek, and there is no focused mechanism by which to compile those data. Akin to the above analysis, however, despite the unavailability of specifically quantified financial data on this side of the equation, it is foreseeable that a reduction in timber harvest-related water quality impacts would result in positive economic effects in a number of areas.

The foreseeable positive economic effects include a reduction in costs or losses associated with the following areas:

- Losses to commercial and non-commercial fisheries;
- Landslide stabilization and remediation;
- Damage to homes and disruption of life and livelihood, including loss of work time and related earnings, caused by sediment accretion and the resulting increased frequency and magnitude of flooding;
- Damage to roads and bridges caused by flooding;
- Dredging of Humboldt Bay as well as upstream problem flooding areas;
- Adverse effects on recreational uses (including specifically the Headwaters Forest Reserve, paid for with \$468 million in taxpayer dollars), and concomitant tourist-related revenues; and
- Impacts to and the costs of replacing domestic and agricultural water supplies.¹

These costs are not quantifiable based on information available at this time, but are quite large, likely in the many millions of dollars, excluding the intangible impacts of disruption, displacement, and conflict over impacts.²

¹ Palco has reported to staff that the company has already spent well over a million dollars studying, designing and replacing a limited number of water supplies in the North Fork Elk River under Cleanup and Abatement Order No. 98-100. Abatement activities are often more expensive than prevention.

² This regional water board has had forty-seven (47) hearings, tours and workshops, consuming hundreds of hours of regional water board public meetings and, since 2000, the total of an estimated twenty-five (25) years of staff time, on the subject of Pacific Lumber Company's timber harvest-related water quality

Compliance with Water Code Section 13360

This section of the Water Code addresses limitations on the Regional Water Board in specifying the method and manner in which a discharger complies with a permit. Numerous comments on this subject were received in the previous comment period, and are addressed in the "Response to Comments Pertaining to Legal and Procedural Issues," Tab 1, section 10 of the September Response to Comments, specifically: Comment Group 5, page 3, and Comments 16-23 with more detailed responses, pages 8-15. For the Board's convenience, a segment of that discussion is excerpted here.

Under Water Code section 13360, the Regional Water Board may not "specify the design, location, type of construction, or particular manner" of compliance with a permit. The proposed WDRs do not violate section 13360 because:

- 1) they are appropriate numeric receiving water limitations interpreting and implementing narrative Basin Plan prohibitions and objectives, as set out below,
- 2) the fact that there remains only one meaningful variable – the scale and intensity of land-disturbing and canopy-removing timber harvest activities, remaining to be controlled to achieve Basin Plan compliance in these watersheds in this setting at this time – is not a violation of 13360 under applicable case law, and
- 3) the proposed limits allow the Discharger all options for its method of compliance, including the manner, timing, location, and methods it uses to harvest timber, and to build, repair, and maintain roads.

The WWDRs are necessary numeric interpretations and implementation of applicable narrative Basin Plan objectives and prohibitions, which are as set out in finding number seven (7) in the proposed WWDRs. Among applicable Basin Plan provisions, there are narrative prohibitions against the discharge of timber harvest-related sediment waste in amounts deleterious to beneficial uses. In the issuance of discharge requirements, such as the proposed WWDRs, the Regional Water Board is charged with determining how much waste from a particular activity, in a particular setting, given specific receiving water quality conditions, can be discharged and still be in compliance with those prohibitions. It is consistent with section 13360 to use best professional judgment in applying numeric tools to determine, and to limit WWDRs coverage to only those activities that will comply with the prohibitions, and other applicable objectives.

Here, instead of setting forth the limits in the proposed WWDRs, the Executive Officer could use the same scientific tools, and the same best professional judgment, on a case-by-case basis (rather than a watershed-wide basis) to approve permitting coverage for only up to the amount of timber harvest activity in the watersheds that would, by that analysis, not result in Basin Plan violations, using a variety of available case-by-case regulatory tools, such as SB810 authority to "veto" any THPs that go beyond those calculations. However, the proposed WWDRs are preferable in that they create a more predictable, transparent, methodic strategy that is more user-friendly and business-friendly, as it allows for more certainty in planning.

impacts in these two specific watersheds over the last six years. That does not include hearings conducted by the Department of Forestry and Fire Protection, the State Water Resources Control Board, other agencies, or the dozen or so lawsuits that have consumed and are consuming public agency tax dollars arising from demands for, and opposition to, more rigorous agency response to this problem.

In the Tahoe-Truckee Sanitation Agency matter (SWRCB WQO No. 78-8), the State Board upheld flow limitations imposed by the Lahontan Regional Water Board, in the face of arguments that the limitation improperly specified the manner of compliance by prescribing acceptable inflows from development, effectively limiting land use decisions regarding development. This was shortly after section 13360 was adopted, and was one of the first State Board cases interpreting this section. The State Board upheld the limitation, finding that it should be viewed as a "partial prohibition prescribed pursuant to (Water Code section) 13243. Water Code section 13243 clearly permits a total prohibition against discharge, and therefore, by definition a lesser limitation (i.e., a restriction of flows) in both planning and regulation. That is, a prohibition may be adopted in either a water quality control plan or in waste discharge requirements, or in both." (SWRCB WQO No. 78-8, pp. 25-28.) The proposed WWDRs could reasonably be viewed as either simply implementing existing prohibitions, adopting new prohibitions tailored to these discharge activities on the specified lands in these watersheds, or both, consistent with the Tahoe-Truckee ruling.

In adopting waste discharger requirements, Water Code section 13263(a) also directs that regional boards "take into consideration" the existing condition of the receiving waters (here Elk River and Freshwater Creek), the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance.

In these watersheds, intensive harvest patterns have yielded severe cumulative impacts, degraded receiving water conditions, and curtailments in beneficial uses. These observed and documented conditions present clear evidence that existing timber harvest practices have resulted in chronic and ongoing violations of the sediment discharge prohibitions. The Regional Water Board has made a focused effort to work with this Discharger and within the context of the Forest Practice Act and Rules (FPA&R) for seventeen (17) years, and the Discharger's HCP and SYP for over six (6) years to address the cumulative impact problems in these watersheds without, until very recently, getting to the issue of discharge associated with rate-of-harvest. The FPA&R have never been certified as best management practices, and while the Regional Water Board has found the FPA&R to work fairly well in most cases to achieve water quality protections with little additional regulatory constraints by the Regional Water Board in other watersheds, cumulative impacts in these two watersheds affirm that the usual methods cannot be relied upon to surmount the water quality problems created by long-term and ongoing intensive harvesting activities. This Regional Water Board has spent the last six(6)-plus years seeking and exploring different mechanisms to reduce the impacts of the Discharger's intensive harvest practices in these watersheds to levels that will not violate Basin Plan standards.

Repeatedly, from staff analyses, numerous independent reports, twice by a panel of highly qualified national experts (the Independent Scientific Review Panel), and ultimately, by the Regional Water Board itself (in December 2003), the same conclusion was reached that existing efforts were not adequate to address the problem. The scale and intensity (harvest rate) of timber harvesting overwhelms any capacity for offsetting through mitigations in these watersheds, resulting in discharges in amounts deleterious to beneficial uses and other violations of Basin Plan standards. The only remaining option that is supported by the available facts and science to address this problem is to limit discharges using known, quantifiable correlations between discharges and the primary causal source: the scale and intensity of timber harvest activities on these lands. That is what the WWDRs do, as proposed.

Additionally, as explained in the WDRs, the Discharger is given options for how to achieve compliance with the receiving water limitations. As noted by the California Court of Appeal in Tahoe-Sierra Preservation Council v. State Water Resources Control Board (Tahoe-Sierra) (1989) 210 Cal.App.3d 1421, 259 Cal.Rptr 132:

“Water Code section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants. It preserves the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard. That is all that it does. If, under present conditions of knowledge and technology, there is only one manner in which compliance may be achieved, that is of no moment. (Pacific Water Conditioning Assn., Inc. v. City Council (1977) 73 Cal.App.3d 546, 554, 140 Cal.Rptr. 812.) Where the lack of available alternatives is a constraint imposed by present technology and the laws of nature rather than a law of the Water Board specifying design, location, type of construction or particular manner of compliance there is no violation of section 13360.” (Tahoe-Sierra, p. 1438.)

In the Tahoe-Sierra case, the plaintiff argued that the implementation of applicable Basin Plan standards, specifically narrative prohibitions, that resulted in restrictions on land use, using a classification system that results in limiting areas to be made impervious, runs afoul of section 13360. However, the Court upheld the Regional Board's restrictions.

Various precedential State Water Resource Control Board orders have come to a similar conclusion. For example, in WQO No. 2002-0015 (Vacaville), the city argued that Water Code section 13360 precluded the Central Valley RWQCB from requiring tertiary treatment. The State Board disagreed, and quoting the Tahoe-Sierra case, noted that “[t]he statute is not violated, however, when a Regional Board imposes a discharge standard that may be met in only one manner. ‘Where the lack of available alternatives is a constraint imposed by present technology and the laws of nature’ rather than a permit requirement specifying the manner of compliance, there is no violation of section 13360.” (WQO No. 20026-0015, pp. 37-38.) (*See also*, SWRCB WQO No. 76-11 (Las Virgenes).)

In another case with parallels to this permitting dilemma, the Tahoe City Public Utility District and North Tahoe Public Utility District argued that the Lahontan RWQCB ran afoul of 13360 by imposing WDR limitations that unlawfully resulted in the imposition of development restrictions in their service areas. (SWRCB WQO No. 83-9 (Tahoe City PUD).) Again, the State Water Board disagreed. The State Water Board noted that section 13360 must be read in concert with other applicable statutory requirements, specifically section 13243, which allows regional boards to “specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted.” Reading these two sections together, the State Water Board found that while a regional board may not tell a discharger how to meet discharge limitations, it may impose prohibitions in the Basin Plan, and “implement connection limitations as a method for implementing the prohibition.” (Tahoe City PUD, pp. 9-10.) The present circumstance has strong parallels in that the Regional Water Board is facing limited options for effectively implementing applicable prohibitions, and the solution inexorably follows the cause to its source: here, the intensity and rate of land-disturbing timber harvest activities.

The Regional Board's alleged lack of jurisdiction to regulate timber harvesting, and the contention that we have misinterpreted the recent California Supreme Court decision regarding the jurisdiction of the Regional Water Board.

In the lawsuit temporarily halting these proceedings in September of 2005, *The Pacific Lumber Company and Scotia Pacific LLC v. North Coast Regional Water Quality Control Board et al* (Palco v Regional Water Board) (Humboldt Co. Superior Court, Case No. CV050516), the Discharger made a myriad of arguments as to why the Regional Water Board would be acting in excess of its jurisdiction if it adopted the proposed WWDRs. (Verified Petition for Writ; Complaint for Declaratory and Injunctive Relief ("Petition for Writ"), see e.g., pages 3-4, paragraph 8, pages 10-16, paragraphs 20-29.) As summarized by Palco's counsel in that document, Palco's position has been that:

"It is CDF, not the Regional Water Board, that is designated by law as lead agency with final authority over the conduct of timber operations in this state. See e.g., Cal. Pub. Res. Code § 4582.7(e). Serving in that role, CDF has already established rates of harvest to protect water quality in the subject watershed – the Regional Water Board is without authority to collaterally undermine those decisions." (Petition for Writ, pages 3-4, paragraph 8.)

This is the essence of the arguments strenuously made by the Discharger, in great detail, in multiple lawsuits against the Regional Water Board and State Water Board, challenging both regulatory and enforcement orders.

Fortunately, the issue of jurisdiction was finally put to rest by the California Supreme Court in its ruling on January 30, 2006: *Pacific Lumber Co., et al v. State Water Resources Control Board* (Palco v. State Water Board) (Cal. Supreme Court Case No. S124464). In that ruling, the Supreme Court made abundantly clear that the Forest Practice Act and Porter-Cologne "contemplate the Water Boards' regulation of both existing and proposed discharges of waste" and the Forest Practices Act "acknowledges the Water Boards' authority to regulate timber harvesting activity outside of the THP approval process even before logging has commenced." (Palco v. State Water Board, page 25.) In the latest round of comments, the Discharger expresses concerns over how this Supreme Court decision language should be interpreted in light of Water Code section 13360, which prohibits prescribing means of compliance with water quality objectives. Those concerns were addressed in the September 2, 2005, Responses to Comments, Section 10, pages 8-15, and summarized in the previous section above.

In the end, the High Court rejected, in great detail, all of the Discharger's various other related arguments and resolved them in favor of Regional Water Board authority to fulfill its statutory charge to protect water quality, independent of any determinations made by CDF on the subject.

Allegation that the WWDRs unfairly single out the Discharger and violate the Constitution

In its Petition for Writ, the Discharger alleged that its constitutional right to equal protection under the law was violated. (Petition for Writ, page 6, para. 11.) As accurately laid out by the Discharger, in order to find an equal protection violation there must be no "rational basis" for treating the individual differently than "similarly situated" persons. As noted below, and as detailed and documented in the record, there are few (if any) "similarly situated" persons in the current timber harvest world; and the factual circumstances of these watersheds, ongoing and

anticipated impacts of harvest, and the specific history of this matter provide more than ample “rational bases” for treating this discharger differently than any similarly situated persons, if such persons do in fact exist.

The Regional Water Board is charged with the regulation of waste discharges, those responsibilities and authorities codified in the Porter-Cologne Water Quality Act (CWC 13000). The fact that the Regional Water Board's Permit Issuance Team is preparing waste discharge requirements for the Green Diamond Resource Company for its activities in the South Fork Elk River watershed is testimony to the application of those authorities in a fair and consistent manner; likewise for staff's ongoing efforts to develop WDRs for timber operations by Gualala Redwoods, Inc. in Sonoma County.

While striving for consistency and fairness, the Regional Water Board must also address the specific factual circumstances of each discharger's proposed activities, receiving water conditions, and related site-specific circumstances in order to regulate in a manner that will result in compliance with Porter-Cologne and Basin Plan standards (Calif. Water Code § 13263(a).) As repeatedly described and documented in the extensive record on this matter, there is a rational basis for dealing with these specific watersheds in a manner designed to address the proposed activities, the receiving water conditions, and site-specific information and circumstances. That is what the proposed WWDRs attempt to do, and the legally required rational basis is amply demonstrated in the record.

By way of example, refer to the April 19 and September 2, 2005 staff reports, which summarize a subset of the many facts forming this rational basis, including the fact that “[o]ver the last twenty years, Palco has harvested timber on approximately 80% of its ownership in the Elk River and Freshwater Creek watersheds.” (April 19, 2005, staff report, page 1.) As further described in that summary, over the last nine plus years, the cumulative effects of ongoing and extensive timber harvesting in these watersheds led to numerous petitions to the Regional Water Board to step in and to more effectively protect water quality and downstream residents from these effects. There simply is no other circumstance like this one in the current era with which to compare for “fair and consistent” regulatory treatment.

Simply put, the facts support an approach tailored to resolve the specific problems in these specific watersheds.

Alternative WWDRs Proposed by the Discharger

The Discharger has proposed its own versions of WWDRs to the Board on four occasions, each of them outside of the official public comment review period for the proposed WWDRs. The first proposal was offered at a meeting with Regional Water Board staff on October 24, 2004, followed by the Discharger's Reports of Waste Discharge on January 26, 2005. Both of these alternative proposals occurred prior to the opening of the public comment on the draft WWDRs on June 29, 2005. The third and fourth alternative proposals were made after the August 8, 2005 close of the first public comment period, once in litigation papers filed in November 2005, and again in packages sent to the Regional Board in January 2006.

The Issuance Team has considered and re-considered the Discharger's proposed alternatives to the WWDRs, including the latest version in January 2006. We direct the reader to our April 19, 2005 staff report to the Regional Water Board, which was included in the March 8, 2006

WWDRs public review package. Furthermore, please refer to the September 2, 2005 "Response to Comments Pertaining to Suggested Alternatives to the Proposed WWDRs", and to the April 14, 2006 supplemental Responses to Comments on "PALCO's Proposed Alternative WWDRs."

CHANGES TO THE WWDRs

Changes made to the WWDRs and attendant documents as a result of the first round of public comments were released in an underline (additions) and strikeout (~~deletions~~) mode in the September 2, 2005 package. Those edits were accepted and incorporated into the WWDRs documents in the March 8, 2006 public review package. Subsequent to the March 8, 2006 release, the WWDRs documents have received additional editorial changes, as indicated by underlines (additions) and strikeouts (~~deletions~~) in the attached April 14, 2006 versions. These are non-substantive changes to address spelling, consistency, and grammar, to improve clarity and enforceability, and to adjust specified due dates in the Monitoring and Reporting Program to be consistent with the current WWDRs timeline for adoption and implementation.

One large change in formatting occurred in the Receiving Water Limitations section (Section IV). We clarified the limitations and moved some reporting requirements into Section V. "Specific Provisions," under Item A, "Required Technical Reports." Many of the edits that appear at first glance to be extensive, are on closer review not substantive, as they primarily just move blocks of existing language to new locations, improving readability, and at times improving phrasing for clarity. The substance of the WWDRs and attendant documents has not changed, with one small exception.

The stated number of acres that corresponds to compliance with Receiving Water Limitation B in South Fork Elk River (Section IV, B.2.(a)) has been changed from a total of 133 acres to 114 acres per year, to agree with Landslide Reduction Model outputs listed in Attachment B to the WWDRs. The source of the previous number (133 acres) was a typographical error.

INTEGRATION OF WWDRS WITH OTHER PROGRAMS

These WWDRs are not duplicative of existing regulations; rather, they are an additional means by which to address peak flow changes and timber harvest-related landsliding that are not addressed by current programs. The WWDRs were not developed in a vacuum, but instead have been carefully designed to integrate with existing regulations and programs. Additionally, we recognize the promise in a "master planning" process, whereby we can work with the Discharger and other regulatory (such as the HCP agencies) in a process to ensure integration of all existing programs. Our staff continues to participate in such efforts.

The Timber Harvest Plan Process

The WWDRs were structured to make use of the existing timber harvesting plan (THP) review process. Prior to a project (THP) being enrolled under the WWDRs, it will have first undergone environmental review and public disclosure under the THP review process led by the California Department of Forestry and Fire Protection (CDF). The WWDRs rely on the CDF process to fulfill the California Environmental Quality Act (CEQA) requirements, thereby alleviating the need for the project to undergo environmental review at the time of enrollment under the WWDRs.

The WWDRs require that an Erosion Control Plan (ECP) be prepared for all areas in which timber harvest operations will be conducted, including in-unit areas and roads appurtenant to the logging units. The ECP provides an inventory of all the controllable sediment discharge sources (CSDS sites) located within the project area. The ECP also requires disclosure of proposed corrective actions (management measures) and an implementation schedule for the treatment of all CSDS sites during the life of the THP. The ECP process is currently being utilized on other lands owned by the Discharger and lands within our region as a whole, under the General Waste Discharge Requirements (General WDRs) for Timber Harvest Activities on Non-Federal Land in the North Coast Region. (Order R1-2004-0030)

Similar to the General WDRs, the proposed WWDRS require that specific technical reports be included either as part of the THP or submitted with the WWDRs application package, such as: annual reports on the ECP progress, annual receiving water monitoring data, an erosion control plan for the project area, a petroleum spill prevention plan and other reports as directed by the Executive Officer.

The Habitat Conservation Plan

The Discharger's HCP was prepared in March of 1999 to address the requirements of the Federal Endangered Species Act (FESA) and the California Fish and Game Code with regard to conservation of listed (and a few specified not-yet listed) species, including listed salmonid fishes. It imposes certain prescriptions and provides other benefits that form an important and valued platform upon which the proposed WWDRs are built. However, the HCP was not designed to, and cannot ensure full compliance with the federal and state water quality laws and regulations, such as the Basin Plan prohibition against the discharge of sediment waste in amounts deleterious to beneficial uses like domestic drinking water supplies; nor does the HCP protect against nuisance flooding or directly require the remediation of aggradation of stream channels.

We have discussed the WWDRs with the HCP-signatory wildlife agencies and communicated our intent that the WWDRs not conflict in any way with the HCP. During the first round of public review on the WWDRs, the wildlife agencies submitted written comments indicating that the WWDRs are not in conflict with their programs or with HCP requirements. Additionally, we share with the Discharger and the wildlife agencies the goal of integrating our agency's activities with the wildlife agencies' requirements and the Discharger's activities. Our hope is that the Discharger will participate in a master planning process to avoid any potential future conflicts and to better coordinate activities.

The Regional Water Board Cleanup and Abatement Orders

While the existing Cleanup and Abatement Orders (CAOs) are not part of the proposed WWDRs, they are a critical element in treating ongoing or threatened sediment discharges from existing sediment sites. CAOs currently cover the Discharger's ownership in North Fork, South Fork, and mainstem Elk River. In addition, a CAO for the Freshwater Creek watershed was issued on April 10, 2006. The HCP, the THP process, and the Erosion Control Plans required under the proposed WWDRs address sediment sites, both new and existing, on a THP-by-THP basis. The CAOs are intended to address sites using a broader watershed scale and a prioritization approach designed to restore impaired beneficial uses. The CAOs require updated watershed-wide sediment source inventories and master treatment schedules to be developed. Sites will be prioritized based on watershed recovery goals, considering both the risk and benefit

to water quality at a subwatershed scale. The CAOs also require monitoring of the effectiveness of treatment activities, as it is well documented that restoration activities can result in significant sediment discharges.

The CAOs are the only current regulatory mechanism that can and will require sediment discharge sites to be corrected regardless of the location and timing of timber harvest operations. It is for this reason that the CAOs are not duplicative of any other process under which the Discharger is currently regulated.

Total Maximum Daily Loads

Regional Water Board staff are developing Total Maximum Daily Loads (TMDLs) for sediment in Elk River and Freshwater Creek. The WWDRs are a near-term permitting strategy to allow the Discharger coverage for timber harvest operations while we develop the TMDLs, which are the long-term watershed recovery approach. The intent is that the TMDLs will rely on the Regional Water Board's existing authorities within the framework of watershed restoration: CAOs, WWDRs, and Monitoring and Reporting Programs. The WWDRs currently proposed will be revised once TMDLs are complete and implementation plans are in place. Cooperation, participation and support by the Discharger will be necessary to ensure the TMDLs are completed as quickly as possible.

After much effort, staff and their contractors finally secured data use agreements with the Discharger, to ensure that the TMDL efforts can build on the extensive database of watershed information. Unfortunately, significant delays in establishment of these agreements led to a very short time period for contractors to complete their efforts. At this time, the contractors and staff are working diligently to develop necessary source inventories and analyses. As preliminary products become available, staff will ensure that the Discharger, and other stakeholders, have input. Staff regularly updates the Discharger on its TMDL approach and the envisioned analyses and implementation strategies. To that end, staff continue to work with the HCP signatory agencies and the Discharger on the anticipated monitoring and reporting requirements to be included with the TMDL, to ensure that there is integration with their changing programs.

Monitoring Programs

The WWDRs in large part rely upon monitoring activities already being conducted. Monitoring conducted by the Discharger, as well as other interested parties, will be integrated with the WWDRs monitoring requirements through a master planning process.

SUMMARY

The Regional Water Board has directed staff to develop watershed-wide Waste Discharge Requirements (WWDRs) to address cumulative effects from land disturbance in the Elk River and Freshwater Creek watersheds. This we have done. There are many efforts to reduce sediment discharges in these watersheds, including Cleanup and Abatement Orders and a Habitat Conservation Plan. However, current measures of instream conditions in these two watersheds verify the need to continue to address sediment discharges and peak flows. The basic purpose in developing the WWDRs is to address nuisance flooding and sediment discharges from timber harvest-related landsliding in a pre-TMDL framework. These WWDRs are a near-term permitting strategy to allow the Discharger to conduct timber harvesting activities in these cumulatively impaired watersheds until TMDLs are in place.

Several points are apparent from observations and analyses of information during the development of these WWDRs:

- Timber harvesting activities on lands owned or under the control of the Discharger are, and have for a good number of years, been the primary land disturbing activities in these watersheds.
- Past and current information on cumulative watershed impacts in the Elk River and Freshwater Creek watersheds, which include sediment delivery and nuisance flooding, preclude enrollment of THPs under our General WDRs for timber harvesting activities in these watersheds.
- Ongoing activities and programs in the watersheds, such as the Habitat Conservation Plan and the Regional Water Board CAOs, go a long way to addressing sediment delivery.
- The CDF harvest limitations were calculated to not worsen peak flows and nuisance flooding over already elevated conditions.
- The express need for reduction of peak flows and nuisance flooding, and for the reduction of timber harvest-related landsliding, is not sufficiently addressed by any current program.
- In-stream trends monitoring data made available to the Regional Water Board staff to date are inconclusive—the majority of sites have not changed, and of the remainder, some sites have improved, and others have worsened.
- The Regional Water Board staff remains willing to participate with the Discharger in a master planning process, and endeavors to integrate the WWDRs with other programs in the watersheds.
- The Regional Water Board's Issuance Team has followed a legal, appropriate and open public process for review, comment, and revision of the draft WWDRs released on June 29, 2005 with two public reviews, revisions to the WWDRs, and responses to comments preparatory to Regional Water Board public hearings and consideration for adoption.

The situation in these two watersheds calls for regulation in addition to that currently being applied to address nuisance flooding and timber harvest-related landsliding, as articulated in the Regional Water Board's December 3, 2003 motion. The Regional Water Board has the legal obligation and authority from the Porter-Cologne Water Quality Control Act (California Water Code, Division 7, Section 13000 et seq.) and a January 30, 2006 California Supreme Court decision (*Pacific Lumber Company v. California State Water Resources Control Board*, Opinion No. S124464) to address timber-harvesting impacts to protect, maintain, and restore water quality and beneficial uses.

The WWDRs are constructed to enroll CDF-approved THPs into a framework to address peak flow and harvest-related landsliding through receiving water limitations based on observed data and observed relationships between water quality impacts and land disturbance. Integrated with Regional Water Board CAOs, the HCP, ECPs, existing monitoring, and other activities, these WWDRs constitute a crucial component of a comprehensive framework that can be improved upon only by the implementation of TMDLs, currently in development.

The Regional Water Board staff is committed to integrating all programs in the watersheds to ensure that we take advantage of opportunities, optimize the use of Discharger and agency resources, and provide a smooth transition into the implementation of these WWDRs and the upcoming TMDLs. Without these WWDRs, we will be missing an important component and an overarching framework, and our efforts to address sediment discharges and nuisance flooding will continue to be fragmented.

PRELIMINARY STAFF RECOMMENDATION

The Issuance Team recommends adoption of Resolution No. R1-2006-0038 and Order No. R1-2006-0039 and attendant attachments for the Elk River watershed, and adoption of Resolution No. R1-2006-0040 and Order No. R1-2006-0041 and attendant attachments for the Freshwater Creek watershed.